

# THE DISPUTE RESOLUTION GROUP

I N C O R P O R A T E D

January 26, 1993

Office of the Secretary  
Federal Communications Commission  
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Here are an original and ten copies of our Comments in MM Docket 92-266, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation.

FEDERAL COMMUNICATIONS COMMISSION  
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Very truly yours,

*Howard D. Friedman*

Howard D. Friedman

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In The Matter of )  
 )  
Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition Act )  
of 1992 )  
 )  
Rate Regulation )

MM Docket 92-266

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF  
THE DISPUTE RESOLUTION GROUP, INC.**

The Dispute Resolution Group submits Comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") released December 24, 1992. The Dispute Resolution Group is an alternative dispute resolution group practice that specializes in the settlement of a broad range of civil disputes. The Dispute Resolution Group's services include: training and providing knowledgeable neutral mediators and arbitrators; facilitating policy negotiations; developing and administering dispute resolution programs; and providing training to franchising authorities and cable operators in using consensual dispute resolution processes.

**I. ALTERNATIVE DISPUTE RESOLUTION PROCEDURES ARE AN APPROPRIATE MEANS OF SETTING CABLE SERVICE RATES AND RESOLVING CABLE SERVICE RATE DISPUTES AND COMPLAINTS.**

The Commission is committed to the use of Alternative Dispute Resolution Procedures ("ADR") in Commission proceedings and proceedings in which the Commission is a party.<sup>1</sup> The Commission also encourages the use of ADR in proceedings where it appears that the public interest will be served.<sup>2</sup> With respect to reservations expressed about the suitability of ADR to certain kinds of cases, the Commission correctly notes that many of these concerns can be answered by the underlying reality that ADR is consensual.<sup>3</sup>

**A. ADR Is An Appropriate Means of Resolving Basic Cable Rate Disputes**

In establishing regulations governing rates for the basic service tier,<sup>4</sup> the Commission must seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and itself; and it may adopt mechanisms and procedures to achieve this objective.<sup>5</sup> Furthermore, the

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<sup>1</sup>. Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, 6 FCC Red 5669 (1991). This would include arbitration, mediation, settlement negotiation, negotiated Rule Making, and other consensual methods of dispute resolution. Id., at 5669.

<sup>2</sup>. Id., at 5672

<sup>3</sup>. Id., at 5673

<sup>4</sup>. Communications Act, Section 623(b)(7)(A), 47 U.S.C. Section 543 (b)(7)(A).

<sup>5</sup>. Communications Act, Section 623(b)(2)(A) and (B), 47 U.S.C. Section 543(b)(2)(A) and (B).

Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act of 1992")<sup>6</sup> requires that the Commission's regulations regarding basic service rates include procedures for the expeditious resolution of disputes between cable operators and franchising authorities.<sup>7</sup> Finally, the Commission has voiced understandable concerns about the burden the Cable Act of 1992 imposes on the Commission's own resources.

ADR will reduce the administrative burdens on involved parties. ADR is less costly and time-consuming than administrative proceedings and litigation, and that frees government and cable executives respectively to govern and run their companies rather than languish in endless conflict. Franchising authorities and cable operators can minimize costs and time. In addition, some franchising authorities -- particularly in smaller cities-- may not have the manpower or expertise to adequately determine rates or address a dispute about basic service rates.

ADR processes can accomplish all these purposes and are appropriate for use at every stage of determining rates and addressing resulting disputes. Mediations among franchising

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<sup>6</sup>. Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("Cable Act of 1992").

<sup>7</sup>. Communications Act, Section 623 (b)(5)(B), 47 U.S.C. Section 543 (b)(5)(B).

authorities, cable operators, and interested parties can produce agreed outcomes that require no further regulatory activity. If mediation fails, consensual binding arbitration produces outcomes that eliminate appeals and again make further regulatory involvement unnecessary. Both ADR processes eliminate the necessity for political posturing, enable the parties to preserve and enhance their continuing relationship, and facilitate more businesslike decisions in this important area.

The public interest would also be served by ADR. Cable subscribers would be better served by cable operators' devoting their time, energy, and money to the industry's future --signal compression, optical fiber, video-on-demand, and alternate access-- rather than to administrative proceedings or litigation.

The Dispute Resolution Group accordingly urges the Commission to: (1) encourage the use of ADR for resolving basic service cable rate disputes; and (2) confirm that ADR is an acceptable local approach to setting basic service rates.

The Dispute Resolution Group also suggests that ADR be considered prior to local courts' or the Commission's resolving on appeal a local authority's rate decision. In other words, if a local rate decision is disputed between an operator or subscriber and a franchising authority and ADR was not used to set that rate, ADR is an appropriate means for resolving that

conflict quickly, inexpensively, and without burdening public resources.

The Commission has previously noted that a good faith effort to avoid protracted litigation will benefit both the private parties involved and the American public.<sup>8</sup>

If the Commission decides the Commission itself is the appropriate forum for appeals, we urge the Commission strongly to encourage those who invoke the Commission's processes to consider seriously the use of ADR. The Commission has expressed its commitment to resolving appropriate disputes through mediation, arbitration, settlement negotiation, and other means of dispute resolution where the parties consent to their use and where such practice is consistent with the Commission's statutory mandate.<sup>9</sup>

For the same reasons, The Dispute Resolution Group proposes that the Commission endorse use of ADR procedures in the following instances: (1) when the Commission asserts jurisdiction in cases of revocation or disallowance of a franchise authority's certification; or (2) the Commission exercises jurisdiction over basic service rates through alternative jurisdictional division (for example, through

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<sup>8</sup>. See Use of Alternative Dispute Resolution Procedures in Commission Procedures and Proceedings in which the Commission is a Party, 6 FCC Red 5669, 5670 (1991).

<sup>9</sup>. Id.

individual petitions or complaints or where local authorities have not sought certification).

To render ADR compatible with the Cable Act of 1992 the Dispute Resolution Group proposes that the Commission confirm that ADR procedures for basic service rate disputes are to provide a reasonable opportunity for consideration of the views of interested parties.

**B. ADR Should Be Used to Resolve Cable Programming Service Disputes.**

The Cable Act requires that the Commission establish "fair and expeditious procedures" for receiving, considering and resolving complaints from "any subscriber, franchising authority, or other relevant State or local government entity" alleging that rates for cable programming services are unreasonable in accordance with its rules.<sup>10</sup> Based on the legislative history of the Cable Act of 1992, the Commission intends to devise procedures that are "simple and expeditious."<sup>11</sup>

According to current Commission records, there are approximately 33,000 cable "community units" (as defined in Section 76.5 (dd) of the Commission's Rules) nationally which are

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<sup>10</sup>. Communications Act, Section 623(c)(1)(B), 47 U.S.C. Section 543 (c)(1)(B). "Cable programming service" is a term defined in Section 623 (1)(2), 47 U.S.C. Section 543 (1)(2).

<sup>11</sup>. Notice of Proposed Rulemaking, FCC 92-544, para. 98, December 24, 1992.

subject to the jurisdiction of local franchising authorities.<sup>12</sup> No one can predict how many cable programming service rate complaints will be filed with the Commission. However, the sheer number of local franchising authorities --and cable subscribers-- suggests that the number of complaints filed could cause a burden on the Commission's resources. In addition, if a large volume of complaints are filed, the Commission's resources will likely be burdened regardless of how simple and informal the procedures are for receiving complaints from franchising authorities and subscribers.

We urge the Commission to encourage those who invoke the Commission's processes to seriously consider the use of ADR to resolve disputes about rates for cable programming services. The Dispute Resolution Group submits that ADR can help make FCC proceedings more efficient, less costly, and less complex. By encouraging ADR, the Commission would be adopting procedures that are fair, simple, and expeditious and meet its policy objectives. The Dispute Resolution Group suggests that the Commission emphasize to the parties that ADR procedures are purely voluntary and that any parties choosing not to use ADR procedures will not be penalized in any manner.<sup>13</sup>

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<sup>12</sup>. Id., at footnote 34.

<sup>13</sup>. See use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party, 6 FCC Red 5669, 5670 (1991).



As noted above, ADR processes can accomplish these purposes and are appropriate for use at every stage of determining rates and addressing resulting disputes. Mediations among franchising authorities, cable operators, and other parties can produce agreed outcomes that require no further regulator activity. If mediation fails, consensual binding arbitration produces outcomes that eliminate appeals and again make further regulator involvement unnecessary. Both ADR processes eliminate the necessity for political posturing, enable the parties to preserve and enhance their continuing relationship, and facilitate more businesslike decisions in this important area.

## **II. ADR IS THE MOST APPROPRIATE MEANS OF RESOLVING CONFLICTS CONCERNING LEASED ACCESS.**

The Dispute Resolution Group supports the Commission's tentative findings that ADR may be the most appropriate means of resolving conflicts concerning leased access. The Dispute Resolution Group agrees that ADR procedures provide parties with an effective tool for dealing with conflict, while avoiding the expense and delay of adversarial proceedings.<sup>14</sup>

The Dispute Resolution Group proposes that the Commission allow parties at any time to use ADR procedures for leased access disputes. Parties to a leased access dispute should be permitted to elect ADR (1) at the outset of a dispute; and (2) for all

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<sup>14</sup>. Notice of Proposed Rulemaking, FCC 92-544, para. 168, December 24, 1992.

types of leased access disputes. Any reservations a party may have about the suitability of ADR --including when it should be used and for what type of disputes-- can be answered by the reality that ADR is consensual. And unlike adversarial proceedings, ADR empowers parties mutually to resolve their differences and to structure innovative settlements.

### III. CONCLUSION

The Commission is committed to the use of ADR to expedite and improve its administrative process whenever feasible. In addition, as a matter of policy, the Commission encourages the use of ADR in proceedings where it appears that the public interest will be served.

ADR would afford parties the opportunity to bring cable service rate-settings and disputes to a rapid conclusion without burdening the Commission's resources and with fewer demands upon the parties' resources. Any reservations parties may have about using ADR to determine rates or resolve cable rate disputes can be answered by the reality that ADR is consensual. ADR is an alternative to traditional administrative proceedings, and it is not meant to supplant or foreclose agency procedures.

The Commission should encourage parties to use ADR to set basic service rates and resolve basic service rate disputes. This will reduce the administrative burdens on all parties and


provide for the expeditious resolution of disputes between cable operators and franchising authorities. A good faith effort to avoid litigation or administrative proceedings will benefit the parties and the American public.

The Commission should also encourage parties to use ADR to set cable programming service rates and resolve cable programming service rate complaints filed with the Commission. ADR will help make Commission proceedings more efficient, less costly, and less complex. By encouraging ADR, the Commission would be adopting procedures that are fair, simple, and expeditious and that meet its policy objectives.

Finally, The Dispute Resolution Group supports the Commission's tentative findings that ADR is the most appropriate means of resolving conflicts concerning leased access.

Respectfully submitted,

**THE DISPUTE RESOLUTION GROUP, INC.**

By:   
Howard D. Friedman, Esq.  
55 Park St.  
Montclair, New Jersey 07042

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